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# VIRGINIA LAW REGISTER.

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## THE RELATION OF THE AMERICAN BAR TO THE STATE.\*

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I am not vain enough to take this invitation from the famous bar of your famous Commonwealth as a mere personal compliment. I like better to think of it as a token of the willingness of Virginia to renew the old relations of esteem and honor which bound your people to those of Massachusetts when the two were the leaders in the struggle for independence, when John Adams and Sam Adams sat in council with Jefferson and Henry and Lee, when the voice of Massachusetts summoned Washington to the head of the armies and Marshall to the judgment seat, when Morgan's riflemen marched from Winchester to Cambridge in twenty-one days to help drive the invader from the Bay State, and when these two great States were seldom divided in opinion—never in affection.

These two States, so like in their difference, so friendly even in their encounters, so fast bound even when they seem most asunder, are, as I think, destined by God for leadership somewhere. I thank Him—we can all thank Him—that He permits us to believe that that leadership is hereafter to be exercised on a scale worthy of their origin and worthy of the training He has given them. Nothing smaller than a continent will hold the people who follow where they lead. When the Massachusetts boy reads the history of Virginia, it will be with the property of a countryman in her fame. When the Virginian hears the anthem of Niagara, he will know the music as his own. When he comes to Boston, the mighty spirits that haunt Faneuil Hall will hear, well pleased, a footstep which sounds like that of the compatriots and comrades, with which, in danger and triumph, they were so familiar of old.

As is natural for communities of high spirit, independent in thought, of varying employment and interest, they have had their differences. But if you take a broad survey of human history, it will

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\* Annual Address, by Hon. George F. Hoar, of Massachusetts, before the Virginia State Bar Association, at Old Point Comfort, July 7, 1898.

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be hard for you to find two peoples more alike. They are the two oldest American States. It was but four years from the landing at Jamestown to the landing at Plymouth. Each has been, in its own way, a leader. Each has been the mother of great States. Each is without a rival in history, except the other, in the genius for framing constitutions and the great statutes which, like constitutions, lie at the foundation of all government. When Virginia framed the first written constitution, unless we except the compact on board the *Mayflower*, ever known among men, her leaders studied the history and delighted to consult the statesmen of Massachusetts. "Would to God," writes Patrick Henry to John Adams from Williamsburg, where the Constitutional Convention of Virginia was sitting, "would to God you and your Sam Adams were here. We should think we had attained perfection if we had your approval." When a Virginian pen drafted the Declaration of Independence Massachusetts furnished its great advocate on the floor. When Virginia produced Washington Massachusetts called him to the head of the army. When Virginia gave Marshall to jurisprudence it was John Adams of Massachusetts who summoned him to his exalted seat. The men who have moulded the history of each sprung from the same great race, from which they inherited the sense of duty and the instinct of honor. Both have always delighted in the discussion of the profoundest principles in government, in theology and in morals. Rich as has been their annals in names illustrious in civil life, the history of each has been largely a military history.

There is no more touching story of the munificence and bounty of one people to another than that of Virginia to Massachusetts when the port of Boston was shut up by Act of Parliament and by a hostile English fleet. I dare say generous Virginia has disdained to remember the transaction. Massachusetts never will forget it.

Little had happened which bore hardly upon Virginia. You were an agricultural people. The great grievance of New England after all was not taxation, but the suppression of her manufacture. There was no personal suffering here. It was only the love of liberty that inspired the generous people of the Old Dominion to stand by Massachusetts.

The statute of 14 George III., known as the Boston Port Bill, entitled "An Act to Discontinue in Such Manner and for Such Time as are Therein Mentioned, the Landing and Discharging, the Lading or Shipping of Goods, Wares, Merchandise at the Town and Within the

Harbor of Boston in the Province of Massachusetts Bay," was enacted by the British Parliament in March, 1774. It was meant to punish the people of Boston for their unlawful resistance to the Tea Tax and to compel the Province to submission. "If you pass this act with tolerable unanimity," said Lord Mansfield, "Boston will submit, and all will end in victory without carnage." The act took effect at twelve o'clock on the first of June, 1774. Boston depended almost wholly on her commerce. In a few weeks business was paralyzed and the whole town was suffering. But George III. and his councillors had Virginia as well as Massachusetts to reckon with. Her generous people rose as one man. Not only letters of sympathy came pouring in to the Selectmen of Boston, but there came substantial contributions of money and food, which, considering the poverty of the time and the difficulty of communication and transport, are almost without a parallel in history. The House of Burgesses appointed a day of fasting and prayer, and ordered "that the members do attend in their places to proceed with the Speaker and the Mace to church for the purposes aforesaid." But they did not leave Boston to fast. Meetings were held all over the Old Dominion. In Fairfax County George Washington was Chairman, and headed the subscription with £50. The convention over which he presided recommended subscriptions in every county in Virginia. Mason ordered his children to keep the day strictly and to attend church clad in mourning. In Westmoreland County John Augustine Washington was Chairman. He enclosed in his letter a bill of lading for 1092 bushels of grain. The generous flame spread among the backwoodsmen. Not only from tidewater but from over the mountains, where the roads were little better than Indian trails, the farmers denied themselves to make their generous gifts. Their wagons thronged all the roads, as they brought their gifts of corn and grain to tidewater. Among the committees by which they were forwarded are the renowned Virginian names—some of them renowned in every generation—Upshaw and Beverly and Ritchie and Lee and Randolph and Watkins and Carey and Archer. But for this relief, in which Virginia was the leader and example to the other colonies, Boston, as Sam Adams declared, must have been starved and have submitted to degrading conditions.

The Norfolk committee say in their letter, "It is with pleasure we can inform you of the cheerful accession of the trading interest of this Colony to the association of the Continental Congress. We wish

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you perseverance, moderation, firmness and success in this grand contest, which we view as our own in every respect."

Virginia and Massachusetts have moved across this Continent in parallel lines. Each has learned much from the other. What each has learned and what each has originated have been taught to many new commonwealths as to docile pupils. I will not undertake to discuss to which, in this lofty and generous rivalry, should be awarded the preëminence. Indeed, it would be hard to settle that question unless we could settle the question, impossible of solution, which owes most to the other. But I am frank to confess that, whatever natural partiality may lead her sons to claim for Massachusetts, the world will be very slow to admit that among the men who have been founders of States in Christian liberty and law there will be found anywhere the equals to the four names of Jefferson, Marshall, Madison and Henry, to say nothing of the supreme name of Washington. As the old monk said of King Arthur, "The old world knows not his peer, nor will the future shew us his equal; he alone towers over other kings, better than the past ones and greater than those that are to be."

No man, when he utters his admiration for the excellence of woman, brings his own mother into the comparison. It would be singularly unbecoming for any son of Massachusetts to be speaking or thinking of the rank which belongs to her in history on an occasion like this. But, saving, therefore, my allegiance to her, I affirm without hesitation that the history of no other civilized community on earth of like numbers, since Athens, for a like period, can be compared with that of Virginia from 1765 or 1770 down to 1825. What her gallant soldier, Henry Lee, said of her most illustrious son may well be said of her: First in War, first in Peace. What a constellation then rose upon the sky! The list of her great names of that wonderful period is like a catalogue of the fixed stars. For all time the American youth who would learn the principles of liberty protected by law; who would learn how to frame constitutions and statutes; who would seek models of the character of the patriot, of the statesman, of the gentleman, of the soldier, may seek instruction from her,—may study her history as in a great university.

One thing is remarkable in the history of Virginia. It is true I think of no other American State. Notwithstanding the splendid constellation of burning and blazing names which she gave to the country in the period of the Revolution and of framing and inaugurating the Constitution, if by some miracle they had been gathered

together in one room, we will say in the year 1770 or 1780, and had perished in one calamity, Virginia could have supplied their places and have maintained almost entirely the same preëminence. I do not know that she could have furnished a second Marshall or a second Washington. But the substance of what she accomplished for America and for mankind in those great days she would have accomplished still. She was like a country made up of rolling hills, where, if those which bound the horizon were levelled, other ranges would still appear beyond and beyond.

The mouth of the James River is the gateway through which civilization and freedom entered this continent. The Spaniard and she Frenchman and perhaps the Norseman had been in America before. But when Jamestown was planted the Englishman came. It is no matter what was his political creed, or his religious creed,—whether Cavalier or Roundhead, Puritan or Churchman, the emigrant was an Englishman, and every Englishman then and since held the faith that liberty was his of right, and when liberty is put on the ground of right, it implies the assertion that government must be founded on right, and that liberty belongs to other men also; and that implies government by law. *Nullum jus sine officio. Nullum officium sine jure.*

Other races have furnished great lawgivers, great writers on jurisprudence and a few great judges. But the sense of the obligation of law as that upon which depends individual right, the feeling that life, liberty, property, are not privileges but rights whose security to the individual depends upon his own respect for them as of right belonging to other men also, a sense pervading all classes in the State, is peculiar to the Englishman and the American alone. It is this which is the security of our mighty mother and of her mighty daughter against the decay which has attended alike the empires and the republics of the past. It is for this that England will be remembered if she shall perish.

Whatever harmonies of law  
The growing world assume,  
Thy work is thine; the single note  
Of that deep chord which Hampden smote  
Shall vibrate to the doom.

The people of Virginia have ever been renowned for two qualities—marks of a great and noble nature—hospitality and courage. Now this virtue of hospitality and this virtue of courage as practised by men

of generous nature mean something more than a provision for physical wants or than a readiness for physical encounter with an antagonist. The true hospitality to a man is a hospitality to his thought; and the highest courage is a readiness for an encounter of thoughts. So in selecting a topic for to-day's discourse, although I hope to find myself in general and substantial accord with the gentlemen who do me the high honor to listen to me, yet I shall not take the smallest pains to seek matters concerning which you and I may be supposed to agree, or to avoid those concerning which you and I may be supposed to differ. I have not the least doubt that the noble hospitality of the Virginia bar will permit me to utter anything which is in my mind without fear, and I have less doubt still that you are ready to furnish champions able to maintain your side of a debate against any antagonist on whatever field.

I wish to devote the time which your kindness accords me to a few thoughts, commonplace enough, I am afraid, but perhaps all the better for that reason, upon the topic, not new, yet ever old—the relation of the American bar as an order or brotherhood to the State.

Certainly the profession of the law is an order and brotherhood. To its ranks belong the great judges, the great advocates, the great writers on jurisprudence, the great lawgivers of all nations and of all ages. When we read of a great service to liberty, to order, to jurisprudence by any one of its members we feel a personal pride, and take a personal share in the glory of the achievement. It is a feeling like that which inspired the members of the great religious orders, the Dominicans, the Franciscans, the Templars, the Knights of St. John, or the Society of Jesus, who have borne the Gospel and the Cross through fire and sword, through famine and pestilence, in poverty and in pain, over seas and across continents. It is a feeling like that of the soldier for his regiment or his army. It is we—we use the regal plural—it is we who vindicated the right to print the truth, with good motives and for justifiable ends, through the lips of Erskine. It is we who marked out the eternal limits which divide justice from injustice, speaking through the authority of Justinian. It is we who, in the very throes of a revolution, secured justice for the British soldiers who had obeyed orders, through John Adams and Josiah Quincy. It is we who withstood King James with Coke, and Louis XIV with D'Aguesseau. It is we who enabled the Constitution of the United States to work as the efficient mechanism of a great and free government, through the judgments of Marshall. It is we whose voices have been raised with a

power greater than that of cannon or bayonet wherever liberty was in peril, or wherever law needed vindication. It is we who with Numa wooed the nymph Egeria in her cavern and brought down justice from Heaven to dwell on earth with men.

One of the ablest of our American lawyers, whose brilliant and glowing eloquence diverted the attention of his countrymen from his profound wisdom and philosophy, pointed out more than fifty years ago the felicity of the position of the lawyer in a free State, as being the preserver alike of freedom and of order.

"It may be said, I think with some truth, of the profession of the bar, that in all political systems and in all times it has seemed to possess a two-fold nature; that it has seemed to be fired by the spirit of liberty, and yet to hold fast the sentiments of order and reverence, and the duty of subordination; that it has resisted despotism and yet taught obedience; that it has recognized and vindicated the rights of man, and yet has reckoned it always among the most sacred and most precious of those rights, to be shielded and led by the divine nature and immortal reason of law; that it appreciates social progression and contributes to it, and ranks in the classes and with the agents of progression, yet evermore counsels and courts permanence and conservatism and rest; that it loves light better than darkness, and yet like the eccentric or wise man in the old historian, has a habit of looking away as the night wanes, to the western sky, to detect there the first streaks of returning dawn."—Choate, vol. 1, page 418.

The profession of the law in this broad and enlarged meaning of the term is no trade or calling. It is a department of government.

Wherever governments have been free, and precisely in so far as they have been free—in Greece, in Rome, and on the Continent—this has ever been the function of our profession. It was never more its function than in our own country and in our own time. The great debate of liberty which preceded the Revolution was conducted in a large measure by lawyers. Of the 52 signers of the Declaration 24 were of the legal profession. The Constitutions of the old thirteen States, the Constitution of the United States, were largely, almost wholly, the work of American lawyers. Of the 55 members of the Philadelphia Convention, 30 had been practising lawyers. The arguments of great lawyers—of Hamilton, of Jay, of Madison—commended the Constitution to the approval of the people. Of the 24 Presidents of the United States, 20, and of the 24 Vice-Presidents 18 have been members of our profession. Today the President, the Vice-

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President, the Speaker of the House, five of the eight members of the Cabinet, and 302 out of the 446 members of the two Houses of Congress were bred to the Bar. And if it be true that Washington and Taylor and Grant came to the Executive chair without a legal training, it is also true that the great counsellors on whom they leaned were of the legal profession.

It is a very remarkable fact that three of our four great ministers of finance, Alexander Hamilton, Robert J. Walker and John Sherman, have been lawyers. Indeed, if we were to go through the list of our most capable men in public life who have dealt most successfully with the problems of finance, whether in the Treasury, in Congress, as Directors of the Mint, as Comptrollers of the Currency, we should find that a larger proportion of them has come from the Bar than from banking or mercantile business. I am not speaking of the class of lawyers who are termed jurists. Lord Chief Justice Coleridge once told me that a jurist was a man who knew a little about the laws of every country but his own. I am speaking of men trained to the duties of the Bar, to the trial of cases and the guiding of clients by wise counsel. The reason is not far to seek. The legal training teaches a man to deal with the complicated transactions of life and to find out where the turning-point lies; what it is that has brought success or has brought failure; to dismiss what is irrelevant and to cling to what is essential. How often the able lawyer or advocate encounters an array of experts, men of science, physicians, merchants, manufacturers, shipmasters, directors of great railroads, and by his skillful and merciless cross-examination satisfies the jury and satisfies the men themselves that they are all wrong and where they have been wrong in concerns to which they have themselves devoted the study of their lives. The man who can extract the truth, the essence, the pivotal fact, the governing law from the various transactions of life when they are brought to the crucible of the court house has acquired a faculty which enables him to do the same thing in the great emergencies and transactions of State. The great War Secretary, Edwin M. Stanton, was a great lawyer. The great War President, Abraham Lincoln, was a great lawyer. The great Secretary of the Treasury and financier of the War, Salmon P. Chase, was a great lawyer. The great diplomatist and Secretary of State, William H. Seward, was a great lawyer.

Undoubtedly a study of the annals of the Confederacy would show a like result. I suppose there is no American, certainly no American

lawyer, who did not feel a thrill of pride when the famous Southern statesman, Judah P. Benjamin, after the war made his way over every barrier and easily took his place as the leader and head of the Bar of Great Britain.

As I said, thirty out of fifty-five of the members of the Convention that framed the Constitution had been practising lawyers. The minority of laymen contributed little to the formation of the instrument. The great authority of Washington, the President, helped much to secure the adoption of the Constitution by his countrymen. But he took no substantial part in the debates. The wisdom and calmness of the aged Franklin more than once helped to compose the strifes which threatened to break up the assembly. But we shall all agree that it is fortunate that his propositions for a single House, for a President and Senators without salary, for an Executive Council, for a power in the President to suspend the laws, and that votes on money bills should be cast by States in proportion to their contribution, were not inserted in the instrument. Let us by no means underrate the value of the silent members in that great deliberative assembly. But it is none the less true that the constructive genius which matured the perfected Constitution from the schemes which were originally proposed was that of the lawyers of the body.

Theirs, too, was in largest measure the power of convincing the understanding of the people, and the skilled and difficult leadership which secured its acceptance. If it would be arrogant to say that the Federalist, the work of three American lawyers, equals any treatise on government that ever preceded it, we may at least say that those who are most familiar with what preceded it admire it most. The failure to ratify the Constitution in either New York, Virginia, Massachusetts or Connecticut would have been fatal to the whole plan and to the permanence of the Union in any form. A majority of the Convention in each of those States, when it came together, was opposed to the scheme. Yet Jay and Hamilton and Livingston in New York, Ellsworth, Sherman and Johnson in Connecticut, Fisher Ames, Parsons and King in Massachusetts, overcame this hostile majority, and in Virginia the fiery eloquence of Patrick Henry, the great authority of Mason, the shrewd dexterity of Monroe, could not hold together the ranks of the opposition against Marshall and Madison and Wythe.

Of our thirty-three Secretaries of State all but one, Edward Everett, have been lawyers, unless we except Mr. Blaine, who studied for a short time in a law office.

Of our forty Secretaries of the Treasury all but three have been lawyers. Of course, all of the Attorneys-General and all the Judiciary have been lawyers. Occasionally some political party tries to change this practice; but they break down like Lord Cocke's "Lack-learning Parliament," of which he says "there never was a good law passed thereat," and like the "Know Nothing" legislature in Massachusetts, of which the same observation might be made. The people, of whatever party, will, as a general rule, go where they think they can get the best service. They know that he can best frame laws, can best discuss laws, can best administer laws, can best expound laws, who has studied law.

Our profession is not the road to wealth. There have been instances, in these modern days of great speculations and of rapid gains, of members of the bar, half lawyer, half speculator, who have acquired vast fortunes. But in the main it is still true—God grant it may be ever true—that the American lawyer is not of the class of men who serve their country for hire. He is like Agassiz. He has no time to make money. He is thinking of his imperilled client. He is thinking of the great principle he is struggling to establish in jurisprudence. He is thinking of an honorable success in a generous controversy. He is thinking of country. He is thinking of duty. He is to be ranked with the clergyman, with the teacher, with the man of letters, with the man of science, with the judge and the statesman and the soldier, who expects to get nothing from life but a comfortable support for himself and his household. His sufficient reward for serving his country is the having served her, or for saving his country, if that fortune should be his, the having saved her.

The young lawyer must choose between this career and this reward and this legacy to his children, and the fishpond and the deer park and the picture gallery and the kennel of hounds and the stud of race-horses. I believe the generous youth of Virginia will not hesitate.

But still the American lawyer has his own ample reward and his own abundant satisfaction. It is from our profession that judges, law-makers and largely the great teachers of public morals always have come. The lawyer is the chief defense, security and preserver of free institutions and public liberty. These never have been, and I believe never will be, in this country chosen from men of wealth. The young lawyer, in making his plans of life, must elect between these two careers. Daniel Webster gives it as the result of twenty-five years' observation, that is the condensed history of most good lawyers

that they lived well, worked hard and died poor. I thank God, that still, all over this country, we may write over the portals of the Temple of Justice the motto which James Otis took for his defense of the House of Representatives of Massachusetts:

Let such, such only, tread this sacred floor,  
Who dare to love their country and be poor.

What then is the duty of the American lawyer, if he is to keep and hold this place of power and of usefulness in the Republic? if he is to be not a money-getter or a tradesman, or a specialist or even a useful and humble private citizen, but is to be alike the conservator of order, the expounder of justice and the champion and bulwark of liberty? The duty of the lawyer is:

First. To have a constant, intelligent and instructed knowledge of public affairs. If his calling be an office and not a trade, he is bound to fit himself for the whole duty of his office. The lawyer who says that for himself he takes no interest in politics and devotes himself wholly to his profession is but half a lawyer. He is but half an American. This does not imply that he shall hold political office, or be a candidate for political office. If our conception of his function be a true one, he holds office already. But he should, within the sphere of his influence, be an authority upon all the great and vital questions which concern the interests of the people. This authority will not be diminished by the fact that it is wielded by a man without the ordinary personal ambitions of life. It is a function for which all his generous studies will have fitted him. I sometimes think that in our sensitive life the power of an absolute disinterestedness is greater than that of any official position, however exalted, in the State or in the Nation. Cicero's description of the old age of the upright lawyer, to whom his fellow-citizens resort as to an oracle after he has retired from the active duties of the State, may be applied, in large measure, to the great lawyer during his whole life:

Quid est enim præclarus quam honoribus et rei publicæ muneribus perfunctum  
senem posse suo jure dicere id quod apud Eannium dicat ille Pythius Apollo: se  
esse eum unde sibi sinon populi et reges at omnes sui cives consilium expetant.

Suarum rerum incerti quos ego ope mea ex  
Incertis certos compotesque consili dimitto  
Ut ne res temere tractent turbidas.

Est enim sine dubio domus jurisconsulti totius oraculum civitatis.

Second. If the American lawyer is to hold his place as in the past he should study his whole science, including Constitutional law and

the science of government, and not be a specialist. I know the great temptation to a man who wishes to get rich rapidly and live easily to devote himself to some specially lucrative department of the profession, to become the servant of some great railroad or manufacturing company, or to get a speculative interest in some patent and let everything else go. But if he do this, he must forever shut himself out not only from high judicial office, but from the high places of advocacy.

As Lord Bacon took all knowledge to be his province, so at least the American lawyer must take the entire law of the country to be his. In that way, and in that way only, the old sarcasm that the law sharpens but does not broaden the intellect will be refuted, and the lawyer will maintain the place he has so far held as the leader and guide of his countrymen in the ways of constitutional liberty.

Third. The duty of the American lawyer is to persuade the American people to submit all its grievances to the arbitrament of law; if the law be right, to enforce it; if the law be wrong, to change it. I believe that in spite of the mob spirit in some great capitals, in spite of the perpetual strife between wealth and poverty, between labor and capital, the influence of the profession of the law directed to this end will be sufficient to accomplish it. The American people will reason out their differences and not fight them out. These difficulties will be settled in the court house, not in the street, by judges and juries and not by mobs, by arguments and not by bayonets. The influence of the profession in this way may be immense. Every disappointed litigant is in close relation with an equally disappointed advocate, and will listen to and accept his counsel. This will sometimes, I know, be a hard saying. But it is worthy of all acceptance. It is hard to submit to injustice. It is easy to persuade men who suffer under social inequalities that a decision against them is against law, or that the judgment has been procured by corrupt means or by improper influence. It is hard to wait patiently for a remedy. It is easy to persuade men to overthrow the great safeguards on which life, liberty and property depend, under the influence of disappointment or the sense of wrong. But surely it is better to await a slow redress from peaceful instrumentalities than to substitute the methods of revolution or of mobs for legal and constitutional processes. The habit of respect for judicial tribunals and of deference for their decisions, if cultivated by our profession, will prevail among the people. Under our system the judges are often compelled to decide great political questions concerning which great political parties differ. I always lament when in times of political ex-

citement the court is brought into the discussion. I always specially lament when advocates or judges permit themselves to speak in the court house of the effect of this or the other decision upon popular feeling, or the danger that a certain decision may excite popular disapprobation. Such an utterance from the lips of an advocate is lamentable; from the lips of a judge it is unpardonable. There are few finer sayings in modern times than that of the late Lord Justice Bowen, who died too early for his own fame, when he said in his speech at Balliol in 1887:

"These are not days in which any English judge will fail to assert his right to rise in the proud consciousness that justice is administered in the realms of Her Majesty the Queen, immaculate, unspotted and unsuspected. There is no human being whose smile or frown, there is no government, Tory or Liberal, whose favor or disfavor can start the pulse of an English judge upon the bench, or move by one hair's breadth the even equipoise of the scales of justice."

Experience has shown that the errors of judicial decisions require no revolution or disorder or violence for their remedy. The experience of England and of this country alike demonstrates that there is nothing over which a sound and healthful public sentiment makes a peaceful way more surely than over a judicial decision which is unjust or wrong or in restraint of liberty or in favor of rank against the people or the rich against the poor. The court soon finds a way out of it. It gets limited and trimmed. Its corners get cut. The vigor and vitality are construed out of it. It is founded upon the sand. Settled, permanent, deliberate public opinion, sometimes taking generations, sometimes taking centuries to grow and ripen, prevails in the end alike over the edict of the monarch, the decree of the infallible church, the judgment of the court and the anger of the mob.

It will, I suppose, always be impossible to find a court whose judgments on the great constitutional questions which divide political parties will not be affected by a political bias. Although I think we have come more nearly to it than is commonly believed, I believe we can approach it more nearly still hereafter. If I am right in thinking that the ideal lawyer will take a large interest in public affairs, if our judges are to be selected from our best lawyers, then of course the honest and able judge will take his seat with opinions formed already upon the great constitutional questions of his time. But I believe, in general, he will be able to reconsider those opinions and to deal with new problems as they arise in a spirit of absolute impartiality. He

will be better able, certainly, to reach this high standard of judicial conduct if he know that it is expected of him; that he will have credit for it, and that he may count on the support of the profession, as well of those who differ with him as of those who agree with him, in upholding the authority of his judgment.

I disbelieve and hate the doctrine that justice and righteousness and honor and impartiality and the constraint of public duty cannot be attained, or that, at any rate, they are for monarchies and not for republics; that France may have D'Aguesseau and England may have Hale and Somers, but that the country that produced Washington can produce no impartial and just judge to match them. *Incredulus odi.*

There was, I suppose, no nation—certainly there were few nations—existing when the Supreme Court of the United States was inaugurated equal in power to the great organizations which now appear year after year at its bar to await and accept with submission its decree. Not only the Republic herself as represented by her executive and legislative forces, and great States, larger in population, far more powerful in the resources of modern wealth than most nations living when the Republic was born, but great corporate beings, spanning continents and oceans with their traffic, representing millions of wealth and employing vast numbers of servants appear at this bar as suitors or defendants. These imperial powers are to be encountered by imperial restraints. No other force than that of law will be able to curb them. No law can restrain them or secure the rights of the people against them that is not expounded by a court in whom the public have implicit confidence. This confidence it is the duty of the American Bar to maintain and to inculcate.

The court can never be the instrument of tyranny or injustice. That if it occur will right itself. The legislative power, obedient to the will of a free people, will check and correct such tendencies. So long as the court maintains the confidence of a free people even while it resists the transitory passions of the hour so long the people's rights will be secure. When the judge ceases to be independent justice will cease to be supreme.

Mr. Gladstone said, in a well-known paper: "The American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of men. It has had a century of trial under the pressure of exigencies caused by an expansion unexampled in point of rapidity and range; and its exemption

from formal change, though not entire, has certainly approved the sagacity of the constructors and the stubborn strength of the fabric."

This has doubtless become the opinion in substance of the most thoughtful students of political science the world over. The two elements to which the Constitution of our country owes this distinction are the Senate and the Supreme Court. This great tribunal which keeps the forces of State and Nation alike within their appointed bounds must depend for its authority upon the respect and confidence of the people. That respect and confidence of the people must in my judgment depend upon the influence of the legal profession. A court which has their support will endure. A court which fails of their support will perish. It is well, therefore, surely, that the members of the legal profession carefully consider whether the great power of holding the acts of the popular will as expressed in legislation invalid as repugnant to the Constitution of the United States has been thus far exercised wisely, conscientiously and for the public good; whether these great judgments have been in favor of justice and liberty and not in restraint of them. Let us take a brief review of the exercise of this power from the beginning.

Certainly, the power of the Supreme Court to declare void acts of the National Legislature which it should deem in conflict with the Constitution, a power of which Jefferson was so jealous, cannot anywhere be claimed ever to have been an undue or a dangerous restraint on the power of self-government. Still less, it seems to me, ought Virginia, with the known opinions of the majority of her people, to feel aggrieved with the instances in which that power has been exercised. I doubt whether many Virginia lawyers will be found who, with the single exception of the case of the Income Tax, will not agree that in every instance the Supreme Court of the United States has been right. There have been but fifteen cases in a hundred and ten years in which the Court has held acts of Congress unconstitutional. For the first eighty years there was but one which determined questions likely to excite serious political conflict. That was the *Dred Scott case*.

For the first seventy-five years there was but one case in which an act of Congress was held invalid as being repugnant to the Constitution. That was *Marbury and Madison*, where the court held the Thirteenth Section of the Judiciary Act inoperative so far as it attempts to grant to the Supreme Court power to issue writs of *mandamus* in cases where the Constitution confers no original jurisdiction on the court.

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The majority of the court in the famous *Dred Scott case*, however, denied the power, which had been exercised by Congress before that time, of prohibiting slavery in the territory north of the Missouri Compromise line. But the determination of that point was not necessary to the decision, which was that the court below had no jurisdiction.

Since the war there have been fifteen cases in which acts of Congress have been held repugnant to the Constitution.

*Collector v. Day*, decided at the December Term, 1870, 11 Wall. 113, holds that it is not competent for Congress to impose a tax upon the salary of a judicial officer of a State. This decision only limits by construction the general phraseology of an act of Congress, holding that it cannot apply to the salary of a State officer, and should, therefore, hardly be included among those decisions which hold acts of Congress unconstitutional.

*United States v. Dewitt*, 9 Wall. 41, holds an act of Congress declaring it a misdemeanor to mix for sale naphtha and illuminating oil unconstitutional, as being a police regulation relating exclusively to internal trade of the State.

*Gordon v. United States*, 2 Wall. 561, which holds unconstitutional the statute of March 3, 1863, so far as it authorizes an appeal to the Supreme Court from the Court of Claims in cases where that court acts wholly as an auditor or assessor reporting its decisions to Congress.

*Callan v. Wilson*, 127 U. S. 540, which limits the general language of the statute defining the jurisdiction of the Police Court of the District of Columbia.

*United States v. Fox*, 95 U. S. 670, which holds a provision unconstitutional which declares that every person respecting whom proceedings in bankruptcy are instituted who within three months before their commencement obtains goods upon false pretences shall be punished by imprisonment, on the ground that an act not an offence when committed cannot become such by a subsequent independent act with which it has no connection.

*United States v. Steffens*, 10 Otto, 82, which holds the statute of 1876 concerning trade-marks unconstitutional, as not limited to trade-marks used in international or interstate commerce.

*Boyd v. United States*, 116 U. S. 616, which holds the statute of June 22, 1874, unconstitutional so far as it authorizes a court of the United States to require the defendant in revenue cases to produce his private books.

*United States v. Railroad*, 17 Wall. 332, holding a statute taxing bonds of municipal corporations unconstitutional.

None of them deals with questions about which different political parties or different sections of the country are likely to be in conflict. Part of them only deal with questions of great general interest, and in all of them the decision of the court, I suppose, has met with universal acquiescence. These cases are eight in number.

There remains six cases dealing with the legislation of the disturbed period which followed the war, to-wit:

*United States v. Harris*, 106 U. S. 629, where sec. 5519 of the Revised Statutes is declared unconstitutional on the ground that Congress has no power to pass a law punishing citizens of the States for conspiring to deprive other citizens of the equal protection of the laws of such States.

*United States v. Reese*, 2 Otto, 214, which holds secs. 3 and 4 of the act of May 31, 1870, beyond the limit of the Fifteenth Amendment to the Constitution and unauthorized, as not confined in their operation to unlawful discrimination on account of race, color or previous condition of servitude.

*The Civil Rights Cases*, 109 U. S. 3, which holds the first and second sections of the Civil Rights Acts unconstitutional.

*Ex parte Garland*, 4 Wall. 105, which holds a law unconstitutional which provided that no person should be admitted to the bar of the Supreme Court without first taking an oath that he had never borne arms against the United States, as being *ex post facto* and partaking of the nature of a bill of attainder.

*Justices v. Murray*, 9 Wall. 274, which holds the statute of March 3, 1863, providing for a retrial in the Federal court of facts tried by a jury in the State court unconstitutional.

*United States v. Klein*, 13 Wall. 128, which holds the statute of July 12, 1870, null and void, providing that the acceptance of a pardon shall be exclusive evidence of the acts purporting to be pardoned, as invading the powers both of the judicial and executive departments of the government.

These decisions, six in number, are all in which the court have held unconstitutional acts of Congress in pursuance of the policy of the dominant party in regard to what is called "reconstruction."

This summary comprehends every case from the foundation of the government in which the national legislative power has been held in check by the Supreme Court, with a single exception, which I shall

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speak of presently. The disturbed period which followed the breaking out of the war required the legislative authority of the country to follow paths hitherto untrod. Three Amendments were added to the Constitution, all born of the necessities and of the excitements which attended an armed conflict and the enfranchisement which was its result. It was to be expected that in dealing with exigencies which the generation that framed the Constitution never anticipated there might be wide differences of opinion among the most learned jurists as to the extent to which its power should be found to be flexible and adapted to new conditions.

In each of these cases, it is to be noted, the court held unconstitutional the legislation of the political party to which a majority of its members belonged—the party to which that majority had owed its appointment. In that way the political policy desired by a majority of the people lately victorious in a great civil conflict was frustrated and baffled. The self-government of States lately engaged in an armed conflict with the Government of the United States was preserved.

In *United States v. Harris*, 106 U. S. 629, there was but one Democratic judge, Field, and but one Southern judge, Woods. Every one of the judges was appointed by a Republican President.

In *United States v. Reese*, 2 Otto, 214, there was no Southern judge, and but two Democratic judges, Field and Clifford. All but Clifford were appointed by a Republican President.

In *Ex parte Garland*, 4 Wall. 105, there were four Democratic judges, Nelson, Grier, Clifford and Field.

In the *Civil Rights Cases*, 109 U. S. 3, there was one Democratic judge, Field, and one Southern judge, Woods. All the court were appointed by a Republican President.

In *Justices v. Murray*, 9 Wall. 274, there were four Democratic judges and no Southern judge. All but two were appointed by Republican Presidents.

In *United States v. Klein*, 13 Wall. 128, there were four Democratic judges and no Southern judge. All but two were appointed by Republican Presidents.

I have not time to deal with the cases in which the Supreme Court of the United States has held the laws of the States to be in conflict with the National Constitution. They are more than a hundred in number. In general, they may be reduced to three classes:

First. Cases in which the State has undertaken to invade the national domain of legislation, or of taxation.

Second. Cases where the State legislation has invaded the safeguards established by the amendments to the Constitution, which are in the nature of a Bill of Rights, or securities for personal liberty.

Third. Cases where the State legislation violates the provisions of section 10 of the First Article of the Constitution, which enacts that no State shall pass any *ex post facto* law, or law impairing the obligation of contracts.

I think I may affirm, without danger of challenge or contradiction, that these decisions have, in general, the approbation of the legal profession, and that the people are satisfied with them.

I think, therefore, that I may confidently appeal to my audience to agree with me in saying that the great powers given by the Constitution of the United States to the Supreme Court have been in favor of liberty and of popular self-government, and not in restraint of either; that the great principles and rules of public policy to which Virginia has held from the beginning have found, on the whole, their strength, their safety, their support, in the court to which she has contributed so many shinning lights, and which has found so much guidance, illumination and instruction in every generation from her famous and most illustrious Bar. Are you, on the whole, glad that in the hundred years which followed the adoption of the Constitution, that in the thirty years which followed the last war, you were not left to the unchecked and unrestrained legislative control of a numerical majority?

I suppose there is but one of these decisions which is not in accord with your opinion, which is the opinion of Virginia. So when I declare that the power of our great tribunal to keep the legislative power within its appointed bounds is a power in aid of liberty protected by law, has been wisely exercised from the beginning, and that in every case from the beginning the court have been right, have done what the framers of the Constitution would have done, what the people who accepted the Constitution would have done, what the great Virginians of the elder day would have done, what Virginia herself then and always would have done—I am sure, I believe, of your unanimous assent, save so far as it is to be qualified by your opinion in regard to a single case. Do not impute to me the presumption or the folly of reopening the argument upon the Income Tax cases on an occasion like this. I freely concede the great weight of the argument upon the other side, which has convinced so large a minority of the court and

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so many of the great minds of the profession of all parties, North and South. Indeed, though not myself agreeing with it, I regard the argument of Mr. Attorney-General Olney in support of the validity of an income tax as one of the most masterly in the history of jurisprudence. Your own eminent senior Senator, whose fame as a lawyer is the pride and the honor of the Bar of the whole country, is, as you and I well know, of that way of thinking.

But there are two or three considerations which may, perhaps, lead you to think the decision of the Income Tax cases less surely a public calamity than is sometimes supposed.

Let us admit that the decision of the majority of the court in the Income Tax cases was all wrong. Are there not still some considerations which, perhaps, may lead us to deem it not only less surely a public calamity than is sometimes supposed, but also to think that the conclusion of the majority is one which great jurists, looking with a single eye for the law without fear or favor, without the desire to please or the dread to displease anybody, familiar with the history of the formation of the Constitution, familiar with the public opinion which accepted it, paying reasonable regard also, so far as is fitting, to considerations of public convenience, which might well be supposed to have been in the minds of the framers of the Constitution, might honestly and reasonably, even if mistaken, be supposed to arrive? First. I should like to ask the conscientious American lawyer, before condemning that great tribunal, which otherwise he will concede to be the chief civic ornament and glory of his country, to read the contemporaneous history and to ask himself if he believes that any single State would have adopted the National Constitution if it had been believed that the central power would ever be permitted to invade this domain for the purpose of taxation? Is there any fair ground for finding it as an historical fact that the framers of the Constitution said to the States, in this clause, which we all agree might have been and should have been more clearly expressed: "Give us duties on imports; give us the proceeds of the sales of public lands; give us excises, and you may keep taxes for State purposes. Or, if there shall be a great national exigency, such as war, where the Government needs something more, then, according to our great doctrine of liberty, taxation and representation shall go together. The vote that spends and the purse that pays shall be in the same proportion." Dr. Franklin, as you know, had just proposed that in all appropriations and dispositions of money to be drawn out of the general treasury, and in all laws for supplying

that treasury the delegates of the several States "shall have suffrage in proportion to the sums which their respective States do actually contribute to the treasury." May it not fairly be considered that everybody, or nearly everybody, agrees that a tax upon land is a direct tax, and that a tax upon the income of land cannot be levied by a power that cannot tax the land itself? And that, therefore, great injustice and inequality and disproportion of burden must exist under a system where the income of the great landholder, the Astor or the Sears, is to be exempted and the earning of the professional man or the mechanic is to pay? May we not also profitably reflect that it is likely to be found highly oppressive and inexpedient that the two authorities shall be found taxing the same thing at the same time, and that if the taxing power of the United States keep off that field and domain it is left open to the several States who can make such arrangements as they think fit so that the wealth of the country will be compelled to pay its just and equal share of the public burdens. More and more as the States grow in wealth their objects and necessities for taxation will increase. I suppose that the aggregate of State, county and local taxation in this country must considerably exceed that of the General Government. The total tax in my own State for State, county, city and town purposes considerably exceeds thirty million dollars, of which ninety-one per cent. is levied for municipal purposes. Then it may perhaps give us some little comfort when we reflect how odious an income tax has always been found. Disraeli has declared that the English income tax was a most odious burden which fell with greatest weight on what he called the lower middle class. It was the first of our war taxes to be abandoned by an almost universal consent. So long as human nature remains unchanged so long an income tax will give rise to evasion, subterfuge and perjury. You have tried it in Virginia, perhaps with better fortune than they have had elsewhere. There are but four American States, of whom your State and mine are two, that are willing to tolerate it. And the burden and inconvenience of such a tax must infinitely increase when it is exacted by a central power which cannot deal intelligently with local conditions or make suitable exemptions, and where the final power of deciding all questions is to be exercised hundreds or thousands of miles away. But, as I said, I am not here to debate the constitutionality of the income tax. I am only to insist that whether our great tribunal have erred in one particular they have, in general, been in accord with the best opinion of the country, and with the best opinion of Virginia.

The court is the shield of the minority and the shield of the citizen; the maintenance of its authority is in the last resort to prevent us from becoming, instead of a constitutional government, the government of a pure and unchecked majority, to go surely and speedily the way of the empires and the republics of the past.

There is the moral of all human tales,  
'Tis but the same rehearsal of the past,  
First freedom and then glory—when that fails  
    Wealth, vice, corruption, barbarism at last,  
And history of all its volumes vast  
    Hath but one page.

Certainly, we must agree that the Supreme Court of the United States has scrupulously kept itself aloof from political controversy and kept off the domain which belongs to the political power of the country. It would have been intolerable had it been otherwise. An unchecked tyranny practised by courts under the pretense of administering justice would be a form of oppression hard to be borne anywhere, impossible to be borne by the genius and the spirit of our free people. There have been a few persons—such persons are not now, I think, very numerous—who agree with the opinion which Mr. Jefferson expressed under the excitement of his controversy with Chief Justice Marshall, that it never was intended that the Supreme Court of the United States should have authority to declare void the attempted exercise of legislative power on the ground that it was in conflict with the Constitution. But I suppose, with few and rare exceptions, all thoughtful students and patriotic Americans are glad that the Constitution has been so interpreted, and are glad also that the necessity for this judicial interposition has been so infrequent and that the court has been so sparing and scrupulous in the exercise of this great power. If we look at this judicial power, not as it bears upon immediate and temporary and fleeting conditions, but as it affects the steady, permanent and slow growth of the country, we shall find that the effect of the declaration by the court that an attempted exercise of the legislative or executive power is a violation of our written Constitution is only to require pause, reconsideration, slowness of procedure in accomplishing what the popular will shall desire. The permanent, settled will, the sober second thought of a great people, will make its way in the end either by changing the Constitution or by changing the construction.

Fourth. The lawyer should study the law with the constant pur-

pose to do what he can to amend and perfect it. Every State and Territory, and nearly every county, should have its Bar Association, whose function should be not only to maintain good fellowship, to preserve the highest standard of professional honor, learning and capacity, but also to make its power felt in the amendment of jurisprudence and in keeping the law constantly abreast of the growing needs and the intelligent public sentiment of the country. But in this matter the ten volumes of the State Bar Association of Virginia furnish abundant evidence that you require no advice and need no spur.

God forbid that anything should so change the temper of the American people as to destroy that healthy and eager discontent, alive to existing evil, constantly yearning for an ideal perfection always to be approached if never to be attained. This is the secret of greatness and of glory. But we need to be taught the lesson of which the American lawyer is the best possible teacher—that everything which is permanent is of slow growth. The mushroom which grows in a night perishes in a day, while the oak slowly adds ring to ring through its centuries of life. I hope that our people will be taught this lesson by the American Bar, especially in dealing with their Constitution. We may make changes of mere mechanism like that which grew out of the contested election between Jefferson and Burr; we may make new securities for individual right like those which followed immediately after the adoption of the Constitution and those which followed the war. But let us hold fast to the substance of this wonderful structure the like of which the world never yet saw and the equal of which it is not likely to see again until the experience not of a year, not of a Presidential term, not of a single generation but at least of a century has demonstrated that it has failed.

In submitting what I have had to say to the considerate judgment of the Bar of Virginia I have spoken freely and plainly as is due to my own self-respect and as becoming one speaking to such an audience. I have spoken in behalf of a tribunal whose Constitutional judgments upon the greatest questions with which it has ever had to deal have overthrown, baffled and brought to naught the policy in regard to the great matter of reconstruction, of the party to which I myself belong and the school of politics in which I have been trained and which, I suppose, was also that of a majority of the American people. I submit. I believe that the example of such submission is better and promises more for the continued life of the Republic than any party

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success or than the prevalence of any special policy. The life and the glory of this country are to depend not on armies or navies, not on wealth, not on victory, not on empire, not on commerce, not on numbers, but upon the sentiments which govern the individual citizen—above all, on the sentiment which it is the function of our profession to inculcate—that of obedience to law. The one most sublime thing in the Universe, except its Creator, is that of a great and free people governing itself by a law higher than its own desire. In that sublime pathway it was the function of Virginia to be the leader in the early days. That leadership may still be hers. Whatever may be the influences that determine the future of a great State the strongest of all is its own history. The Virginian youth, bred to the contemplation of her mighty past and to form himself upon the great models she has furnished in every generation, can secure for himself and for her a power over the future of the Republic to which her own past alone can furnish a parallel. What Virginia helped win for us, what Virginia helped build for us, let Virginia defend for us, let Virginia preserve for us. And the leader of three millions shall be the leader of a hundred millions.